

AO 89-003



NORTH CAROLINA BOARD OF ETHICS

116 WEST JONES STREET
RALEIGH, NC 27603
(919) 733-5103

K. D. KENNEDY, JR.
CHAIRMAN

July 27, 1989

Senator Laurence A. Cobb
State Legislative Building
Raleigh, North Carolina, 27611

Dear Senator Cobb:

We have considered the information submitted in your letter dated July 25, 1989.

Under Executive Order Number One, we would not find a conflict of interest between your official duties as a member of the Utilities Commission and your ownership of mutual funds as mentioned in your letter.

Therefore, we would not recommend that you dispose of the funds prior to taking the oath of office.

We are unable to advise you on whether your present investments would constitute a conflict with the provisions of G.S. 62-11.

Sincerely,

K.D. Kennedy, Jr.
Chairman

cc: Mr. James Wallace, Jr.
Assistant Attorney General



North Carolina General Assembly

Senate Chamber

State Legislative Building

Raleigh, 27611

(91 9) 733-5742

SENATOR LAURENCE A COBB
35TH DISTRICT
SENATE MINORITY LEADER

July 25, 1989

ADVISORY BUDGET COMMISSION

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CHARLOTTE N C 28282 (704) 375- 1431

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RALEIGH, N C 2761 1

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PUBLIC UTILITIES
STATE GOVERNMENT
WAYS AND MEANS

Mr. K. D. Kennedy, Jr., Chairman
North Carolina Board of Ethics
Administration Building
116 W. Jones St.
Raleigh, NC 27603-8003

Dear Mr. Kennedy:

I have been nominated and confirmed for a position on the North Carolina utilities Commission. It is my intention to assume the office immediately upon the completion of the present session of the North Carolina General Assembly.

During the confirmation process, counsel for the Senate and House Committee suggested that out of a an abundance of caution I should request a determination as to whether my holdings in mutual funds could be in conflict with G.S. Section 62-11 which requires that I take an oath that I have no interest in any public utility. By definition, a public utility is limited to those operating in the State of North Carolina.

I enclose herewith a copy of my June 20 letter addressed to the Attorney General and a copy of the July 12 response prepared by Assistant Attorney General James Wallace, Jr.

Since making my initial inquiry, I have learned that in 1977 a request for an opinion was submitted by Ms. Sarah L. Tate both to the North Carolina Board of Ethics and to the Attorney General. This was with respect to the North Carolina deferred compensation plan which allows for investment in mutual fund shares. I enclose copies of this correspondence as well.

The investments which my wife and I have in mutual funds are similar to those in the Deferred Compensation Plan since I have no control over the investments and had no knowledge as to the actual investments made until I requested specific information for the purposes of requesting an opinion. In fact, I do not know whether the companies listed in my June 20 letter have operations in North Carolina so as to be considered public utilities under the definition in the Statute.

I would appreciate it if you would advise whether you feel that my present investments would constitute a conflict with the provisions of G.S. 62-11.

Please let me know if I can furnish you any additional information in this regard.

Very truly yours,

Laurence A. Cobb

LAC/lt
Attachments

cc: Senator A. D. Guy
Representative John Kerr

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North Carolina General Assembly

Senate Chamber

State Legislative Building

Raleigh, 27611

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JUDICIARY II

RULES AND OPERATIONS OF THE SENATE

PUBLIC U-ILrTIES

STATE GOVERNMENT

WAYS ANC MEANS

Attorney General Lacy H. Thornburg
Justice Builcling
Raleigh, NC 27611

Dear Mr. Attorney General:

As I believe you know, I have been nominated as a member of the North Carolina Utilities Commission for a term commencing July 1, 1989. It is my intention to take my oath of office upon the completion of the present session of the General Assembly if my nomination is confirmed. However, a question has arisen as to whether my wife and I might need to dispose of some of our investments prior to my taking the oath of office.

G. S. 62-11 requires that each utility commissioner take an oath which states "that he has no interest in any public utility". My wife and I do have holdings in mutual funds. One of these has 7.3 percent of its assets invested in common stock of NCI Communications Corp. and United Telecommunications. A second has 10.7 percent of its investments in common stock of four utilities not located in North Carolina and 1.2 percent of its assets in common stock of Gandalf Technologies, Inc. We also have investments in two other listed mutual funds, but I do not know what their specific investments are in public utilities. They are a growth stock fund and a quality stock fund which I assume might have some investments in public utilities.

I would appreciate it if you would advise whether in your opinion ownership of any of these mutual funds would constitute an interest in a public utility as referenced in G.S. 62-11. If so, it would be necessary that we dispose of the funds before I take the oath of office.

Attorney General Lacy H. Thornburg
Page Two
June 20, 1989

Thank you very much for your consideration of this question.

Very truly yours,

Laurence A.Cobb

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cc: Senator A. D. Guy
Representative John Kerr

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State of North Carolina

Department of Justice

P.O. BOX 629

RALEIGH

2 7 602-0629

July 12, 1989

Honorable Laurence A. Cobb
Senator, 35th District
Room 1118 State Legislative Building
Raleigh, North Carolina 27611

Dear Senator Cobb:

I am writing in response to your inquiry of June 20, 1989, and our phone conversation of later date regarding your intentions to qualify as a new member of the North Carolina Utilities Commission upon the adjournment sine die of the current session of the General Assembly.

You have posed for our consideration an issue which essentially boils down to this: In light of the provisions of N.C. Gen.State. §62-11, which require that each member of the Utilities Commission take an oath "that he has no interest in any public utility," may a member properly take such oath if he or she has invested assets in one or more mutual funds which own common stock in public utilities? You state that you and your wife have assets invested in four mutual funds which, considered together, hold stock in both in-state and out-of-state utilities. Two of these funds may or may not hold such stock.

Though we have researched your question at length, it has been extremely difficult to reach a conclusion which is totally satisfactory to us. Our research in other jurisdictions has yielded some authority which supports the proposition that investments such as yours do not establish the requisite nexus between an individual and a business entity for one to conclude that the individual has a prohibited "interest" in that entity. We have attached two of those cases, In re Opinion of the Justices, 72 A. 754 (1909), and State ex rel. Bullard v. Jones, 137 P. 544 (1914), for your review. Neither of these cases is directly on point, but they can arguably be read to sanction your service on the Commission in spite of your investments.

However, we have found no cases from North Carolina which address the issue, and, therefore, we feel constrained to note that our courts could read the term "no interest" more literally than those of other jurisdictions, to the end that they would find simultaneous ownership of your investments and commission service to be improper. We hope, therefore, that you can understand our hesitation to advise, without equivocation, that you may properly take the requisite oath.

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Honorable Laurence A. Cobb

July 12, 1989

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I understand that you intend to approach the North Carolina Board of Ethics with your question as well. In the event the board finds that no divestiture of investments is necessary, this office will certainly not take issue with the conclusion. May I suggest that you share the attached opinions with the members of the board in order to support the position that your service on the Commission would be proper.

Hoping that we have been of assistance with respect to your inquiry, I remain

Sincerely,

LACY H. THORNBURG
Attorney General

Jamess Wallace, Jr.
Assistant Attorney General

JWJR: rc
Attachments

cc: Senator A. D. Guv
Representative John Kerr